Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 20, 1999

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals properly applied this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), when it held, in acknowledged conflict with decisions of three other circuits, that claims of negligence based on inadequate warning devices at a railway grade crossing are not pre-empted even though the warning devices at the crossing were installed with federal funds under a project approved by the federal government.

LIST OF PARTIES AND AFFILIATES

In addition to the parties listed in the caption, the following were defendants but not appellants below: Cincinnati, New Orleans & Texas Pacific Railway Company and Norfolk Southern Corporation.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner declares that its parent company is Norfolk Southern Corporation, and that its subsidiaries are the following:

CONSOLIDATED (MORE THAN 50% OWNED) SUBSIDIARIES OF NORFOLK SOUTHERN CORPORATION AND STATES OF INCORPORATION AS OF MARCH 1, 1999

Agency Media Services, Inc.
Atlantic Acquisition Corporation
Atlantic Investment Company
Norfolk Southern Properties, Inc.
Norfolk Southern Railway Company
Northmont Limited Partnership
NS Crown Services, Inc.
NS Fiber Optics, Inc.
NS Transportation Brokerage Corporation
Pocahontas Development Corporation
Pocahontas Land Corporation
TCS Leasing, Inc.
Thoroughbred Direct Intermodal Services, Inc.
Northern Horizons

Norfolk Southern Railway Company Subsidiaries

Airforce Pipeline, Inc.
Alabama Great Southern Railroad Company, The
Atlantic and East Carolina Railway Company
Camp Lejeune Railroad Company
Central of Georgia Railroad Company
Chesapeake Western Railway
Cincinnati, New Orleans and Texas Pacific Railway Company, The
Citico Realty Company
Georgia Southern and Florida Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company
Lamberts Point Barge Company, Inc.
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern International, Inc.
North Carolina Midland Railroad Company, The
Rail Investment Company
Shenandoah-Virginia Corporation
South Western Rail Road Company, The
Southern Rail Terminals, Inc.
Southern Rail Terminals of North Carolina, Inc.

Southern Region Coal Transport, Inc.
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Norfolk Southern Properties, Inc. Subsidiaries

Alexandria-Southern Properties, Inc.
Arrowood-Southern Company
Arrowood Southern Executive Park, Inc.
Carlyle CA Corporation
Carlyle Development Corporation
Charlotte-Southern Corporation
Charlotte-Southern Hotel Corporation
Lambert's Point Docks, Incorporated
NKPI Management, Inc.
Nickel Plate Improvement Company, Inc., The
Norfolk Southern Industrial Development Corp.
Norfolk Southern Tower, L.L.C.
NS-Charlotte Tower Corporation
NS Gas Properties, Inc.
NS Gas Properties, II, Inc.
Sandusky Dock Corporation
Southern Region Industrial Realty, Inc.
Virginia Holding Corporation

Incorporated Subsidiaries Where Stock Not Yet Sold

Thoroughbred Technology and Communications

In addition, NS also owns:

Conrail Inc.
Consolidated Rail Corporation and its consolidated subsidiaries
CRR Holdings LLC
Delaware Otsego Corporation
DOCP Acquisition, LLC
Green Acquisition Corp.
New York Central Lines LLC
Pennsylvania Lines LLC and its subsidiaries.

NORFOLK SOUTHERN CORPORATION

Affiliated and/or Leased Companies (50% or Less Owned) or Partnerships

Ace Insurance Company
Algers, Winslow and Western Railway Company
Amtech Logistics Corporation
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Belt Railway Company of Chicago, The
CK-Southern Associates
CK-Southern Associates #2 L.P.
CK Southern Associates #3, L.L.C.
CNS Limited Partnership
Carlyle Towers, L.L.C.
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chesapeake Crossing Seniors Community One, L.P.

Chesapeake Crossing Seniors Community Two, L.P.
Consolidated Rail Corporation
Conrail Inc.
CRR Holdings LLC
Delaware Otsego Corporation
DOCP Acquisition, LLC
Fiberow Partnership
1575 Eye Street Associates (Limited Partnership)
Florida East Coast Industries, Inc.
Gateway Institutional Tax Credit Fund Ltd.
Gilbert NS Lumber, LLC
Gilbert-PLC Lumber Co.
Gilbert Pocahontas, L.L.C.
Glenwood Square Shopping Center Associates, L.L.C.
Green Acquisition Corp.
Green Real Estate Company
High Point, Thomasville & Denton Railroad Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Martiki-Pocahontas Partnership
Midland Corporate Tax Credit Ltd.
North Charleston Terminal Company
Pace Carbon Synfuels Investors, L.P.
Peoria and Pekin Union Railway Company
Pine Brook Center Limited Partnership
Railbox Company
Railgon Company
700 North Fairfax Street Limited Partnership
Southeast Banking Corporation
Stonebridge Manor Apartments, L.P.
TTX Company
Terminal Railroad Association of St. Louis

Three Commercial Place Associates
Triple Crown Services Company
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

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PETITION FOR A WRIT OF CERTIORARI

Norfolk Southern Railway Company ("Norfolk Southern") hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 173 F.3d 386 (Appendix to Petition for Certiorari ("App.") 1a-25a). The opinion and order of the United States District Court for the Western District of Tennessee denying summary judgment to petitioner is unreported (App. 26a-37a).

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1999. A petition for rehearing was denied on May 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes at issue in this case are 23 U.S.C. §§ 109(e) and 130 and 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434) (App. 40a-45a). The regulation at issue is 23 C.F.R. § 646.214 (App. 46a-47a).

STATEMENT OF THE CASE

In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), this Court unanimously held that federal regulations that prescribe rules for designing "[a]dequate warning devices" installed with federal funds at railway-highway crossings, 23 C.F.R. § 646.214 (emphasis omitted), pre-empt state tort law claims against railroads alleging the inadequacy of those devices. In the years following, the majority of courts of appeals and state supreme courts have been faithful to *Easterwood*, and have adopted a bright-line rule that inadequate-device tort claims are pre-empted where federal funds participated in the installation of warning devices under a project approved by the Federal Highway Administration ("FHWA").[1] The courts of appeals for the Sixth and

[1] *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858, 864-65 (11th Cir. 1998); *Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996); *Hatfield* v. *Burlington N. R.R. Co.*, 64 F.3d 559, 562 (10th Cir. 1995); *Bock* v. *St. Louis Southwestern Ry. Co.*, No. 97-4076, 1999 WL 437240, at *2-*3 (8th Cir. June 30, 1999); *Bryan* v. *Norfolk & W. Ry. Co.*, 154 F.3d 899, 903 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 921 (1999); *Elrod* v. *Burlington N. R.R. Co.*, 68 F.3d 241, 244-45 (8th Cir. 1995); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995); *Lubben* v. *Chicago Cent. & Pac. R.R. Co.*, 563 N.W.2d 596, 600 (Iowa 1997); *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997).

Seventh Circuits, however, have refused to give *Easterwood* a "literal reading." *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 306-07 (7th Cir. 1994); App. 11a-12a. Those courts have engrafted onto *Easterwood* an additional, unfounded prerequisite to pre-emption: namely, that specific evidence be presented that the FHWA evaluated the conditions of a particular crossing and made an independent, site-specific determination as to whether the state agency has selected the proper warning device. See App. 13a-14a; *Shots*, 38 F.3d at 307-09. This Court should resolve this deep and mature 6-2 split among the circuits and state supreme courts on a federal law question that is important to the national uniformity of railroad safety law.

1. *Statutory And Regulatory Background.*

The safety of public railway-highway grade crossings[2] has long been a matter of federal concern. From the inception of the Federal Aid Highway Act, Act of July 11, 1916, ch. 241, 39 Stat. 355, Congress has authorized federal funds for States to use in improving those crossings. See Federal Highway Administration, U.S. Dep't of Transportation, *Rail-Highway Crossings Study* 1-8 (1989) ("*1989 Crossings Study*"). From as early as 1936, see Act of June 16, 1936, ch. 582, § 8, 49 Stat. 1519, 1521, Congress has forbidden expenditure of federal funds on any portion of federal-aid or other designated highways "unless proper safety protective devices complying with safety standards determined by the Secre-

[2] A "public grade crossing" is an intersection of a railway and a public road at the same level. Federal Railroad and Highway Administrations, U.S. Dep't of Transportation, *Railroad-Highway Safety Part II: Recommendations for Solving the Problem* 2 (1972) ("*1972 Crossings Report*").

tary [of Transportation] at that time as being adequate shall be installed or in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e).[3]

In 1970, Congress, troubled by the inadequacy of haphazard state regulation of railroad safety,[4] enacted the Federal Railroad Safety Act of 1970 ("FRSA"), Pub. L. No. 91-458, 84 Stat. 971.[5] The purpose of the FRSA was "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress vested the Secretary of

[3] Such provisions served not only to protect motor vehicle drivers and passengers, but the railroads and their passengers: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, Chattanooga, & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935) (footnote omitted) (discussing grade crossings); *see also Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, 322 I.C.C. 1, 82 (1964) ("In the past it was the railroad's responsibility for protection of the public at grade crossings. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.").

[4] *See* H.R. Rep. No. 91-1194, at 11 (1970) (expressing disbelief that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

[5] The FRSA was originally codified at 45 U.S.C. §§ 421 to 444. As part of a broad reorganization of federal transportation laws, Congress formally repealed the FRSA in 1994 and re-enacted its substantive provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Congress made clear that the repeal and re-enactment were not intended to make any substantive change in the FRSA provisions, other than minor alterations in form or language. *See id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22. Even though the events in question in this case took place before the 1994 recodification, this petition will use the current Title 49 citations for the FRSA provisions.

Transportation with broad powers to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Easterwood*, 507 U.S. at 662. In the FRSA's pre-emption provision, Congress unequivocally declared its intent that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, it only permitted States to "adopt or continue in force any law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*; *Easterwood*, 507 U.S. at 662.

In the FRSA, Congress expressed special concern about railway crossing safety, and it mandated that the Secretary report on the current state of the problem and make recommendations for solving it. See FRSA, § 204, 84 Stat. at 972; Highway Safety Act of 1970, Pub. L. No. 91-605, § 205(a), 84 Stat. 1739, 1742; *Easterwood*, 507 U.S. at 661-62. In his report, the Secretary called for expanded federal funding to the States to install protective devices at public crossings, and underscored the need for passive warning devices even where active devices (such as gates and flashing lights) were not justified. *1972 Crossings Report*, at i-vi.

Congress responded to the Report by enacting section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283.[6] This statute specifically grants States federal funds "for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a). To secure funds, States "must survey all highways" to identify

[6] Congress repealed section 203 of the 1973 Highway Safety Act and re-enacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130 in section 121 of the Surface Transportation Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60.

crossings in need of safety improvements, and must "establish and implement a schedule of projects for this purpose." *Id.* § 130(d).

Soon after the passage of the 1973 Act, the FHWA promulgated regulations to govern federal aid projects "for the elimination of hazards of railway-highway crossings." 23 C.F.R. § 646.200(b); see Reimbursement for Railroad Work and Railroad-Highway Projects, 40 Fed. Reg. 16,057, 16,059 (Apr. 9, 1975).[7] In addition to the general regulations governing state programs for evaluating railway crossing hazards and developing remedial projects, see 23 C.F.R. pt. 924, the FHWA made States "subject to further regulations governing the use of particular warning devices." *Easterwood*, 507 U.S. at 666-67. For all federally funded projects, the States "*must employ* devices that conform to standards set out in FHWA's Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD or Manual)." *Id.* (emphasis added); 23 C.F.R. § 646.214(b)(1). Although it imposes certain requirements if special conditions are present, the MUTCD imposes only one mandatory requirement for all grade crossings: namely, that on each roadway approach to the crossing, there must be one reflectorized "crossbuck sign" (*i.e.*, the traditional X-shaped sign with the words RAILROAD CROSSING on crossed panels). Federal Highway Administration, U.S. Dep't of Transportation, *Manual on Uniform Traffic Control Devices for Streets and Highways* 8B-1 (1988) ("*MUTCD*").

In addition to requiring MUTCD compliance, the FHWA regulations also prescribe what will constitute "[a]dequate warning devices," 23 C.F.R. § 646.214(b)(3)(i) (emphasis omitted), on federal-aid highway projects, see *id.* § 646.214(b)(2), or where "Federal-aid funds participate in the installation of the devices," *id.* § 646.214(b)(3)(i). For enumerated high-risk crossings—such as crossings with multiple tracks, high speed trains operating in areas of limited visibility, or heavy vehicle or train traffic—the FHWA prescribes that only devices that include "automatic gates with flashing light signals" will suffice, unless the FHWA finds otherwise based on diagnostic-team recommendations. *Id.* § 646.214(b)(3)(i), (ii). For all other crossings, the "type of warning device to be installed . . . is subject to the approval of FHWA." *Id.* § 646.214(b)(4). See *Easterwood*, 507 U.S. at 666-67.

[7] The Secretary delegated his statutory power to administer the Acts in question to the FHWA. *See* 49 C.F.R. § 1.48(b), (c)(2).

The procedures for FHWA approval of federal-aid projects, such as the federally-funded installation of warning devices, are set forth in 23 C.F.R. pt. 630. Cf. *id.* § 646.216(a) (general procedures for federal-aid projects apply to railway crossing projects "[u]nless specifically modified herein"). Those regulations prescribe that project "[a]uthorization can be given only after applicable prerequisite requirements of Federal laws, and implementing regulations and directives have been satisfied"—including the requirement in 23 U.S.C. § 109(e) that railway crossing devices are "adequate." *Id.* § 630.106(a).[8] For every project, the State must submit "plans, specifications, and estimates (PS&E), and supporting documents," *id.* § 630.201, the contents of which are determined by the FHWA, *id.* § 630.205(a). Those plans and specifica-

[8] Although the regulations in current form were promulgated in 1996, *see* Federal Aid-Project Authorization, 61 Fed. Reg. 35,629, 35,632 (July 8, 1996), they are the same in substance as the ones that existed at the time of the project approval in this case. *Id.* at 35,630 (indicating no substantive change intended). The regulation in effect at the time of the TDOT (*see infra* p. 8) project approval specifically indicates that authorization of funding required approval of the adequacy of warning devices. *See* 23 C.F.R. § 630.114(b) (1988).

tions must "describe the location and design features and construction requirements in sufficient detail" for FHWA evaluation. *Id.* § 630.205(b). They are submitted to the FHWA "for approval," *id.* § 630.205(c), and the project shall not be advertised for bid or commenced until the plans "ha[ve] been approved by the FHWA and the [State] has been so notified." *Id.* § 630.205(e).

2. *The Tennessee Crossing Program Under The Highway Safety Act.*

The Tennessee Department of Transportation ("TDOT") instituted a crossing program under 23 U.S.C. § 130(d) to survey the more than 3,400 public grade crossings in the State and, using sophisticated computer modeling that considers more than 50,000 factors, to rank those crossings in terms of relative hazard. C.A. App. 311-12. A diagnostic team of highway engineers is assembled to go to priority crossings and determine what warning devices (active or passive) are appropriate. *Id.* at 313-14.

Tennessee has also implemented what it has designated as its "minimum protection program," C.A. App. 315, even though it goes far beyond the federal MUTCD minimum of two reflectorized crossbucks, one on each approach to a crossing. Cf. *MUTCD*, at 8B-1. Tennessee has mandated there will be "two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing, if the road would take it." C.A. App. 315.[9]

In 1987, TDOT surveyed 196 crossings in West Tennessee as part of this program, and sought federal funding

[9] The Tennessee minimum protection program in effect uses the full panoply of passive warning devices, other than those which are used or permitted only in the presence of special conditions. *See 1989 Crossings Study*, at 4-2 to 4-4.

to install any devices necessary to bring those crossings into compliance with the aforementioned program standard. On April 2, 1987, the FHWA Division Administrator for Tennessee authorized the project to proceed, and on June 2 of that year TDOT entered into a project agreement with the FHWA to spend $128,848 of federal funds on those crossings (which represented 99% of the project cost). C.A. App. 488.

One such crossing was the Oakwood Church Road crossing in rural Gibson County, where TDOT's contractor removed existing crossbucks and installed reflectorized crossbucks and three advanced warning signs on that public road.[10] C.A. App. 317, 488.[11] An FHWA engi-

[10] The placement of the three signs and crossbucks at the Oakwood Church Road crossing shows that, despite the numerous crossings in the federally funded project, due attention was given by the governmental authorities to the upgrade needs of each individual crossing.

[11] To ensure that crossing evaluations are not impeded by litigation concerns, Congress has prohibited the discovery or admission as evidence in any federal or state court proceeding of

> reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of [Title 23] or for the purpose of developing any highway safety construction improvement project which may be implemented using Federal-aid highway funds.

23 U.S.C. § 409 Thus, there is no discoverable or admissible evidence of what data or documentation was submitted in support of TDOT's 1987 application for federal funds.

Although it is possible to identify Oakwood Church Road as one of the crossings at which warning devices were installed in this project, section 409 bars discovery of its rank in the Tennessee crossing-hazard index, or of any possible analysis of the crossing by a TDOT diagnostic team. *See* C.A. App. 314-15 (refusal of TDOT official to divulge that information).

neer inspected the project by visiting a sample of the crossings (although not Oakwood Church Road) over a two-day period in November 1987, and certified its completion. *Id.* at 474, 492. On December 11, 1989, the FHWA paid its 99% share of the project cost to TDOT. *Id.* at 493. Thus, federal funds paid for the installation of warning devices at the Oakwood Church Road crossing in Gibson County, Tennessee.

3. *This Litigation.*

On October 3, 1993, Eddie Shanklin was killed in a train collision at the Oakwood Church Road crossing as he was driving to work from his home nearby. Respondent Dedra Shanklin, his widow, brought a wrongful death action under Tennessee statutory and common law against petitioner. She alleged various bases of tort liability, including that petitioner was negligent in failing to install adequate warning devices at the crossing. See App. 2a.

A principal issue both at trial and on appeal was whether, under this Court's decision in *Easterwood*, the FRSA pre-empted respondent's inadequate-device state tort law claim. In *Easterwood*, this Court declared that the federal regulations defining "adequate warning devices" in 23 C.F.R. § 646.214(b)(3) and (4) did "cover[] the subject matter of," 49 U.S.C. § 20106, state tort law requiring due care in the selection of warning devices. 507 U.S. at 670.[12] Those regulations, this Court held, "displace state and private decisionmaking authority by establishing a federal-law requirement that certain pro-

[12] FRSA pre-emption applies to any rule, regulation, or standard issued by the Secretary of Transportation that relates to railroad safety, and not just those issued under the authority of the FRSA *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 663 n.4 (1993). As this Court noted in *Easterwood*, however, 23 C.F.R. § 646.214(b)(3) and (4) were promulgated in part under the FRSA. *Id.*

tective devices be installed or federal approval obtained." *Id.* The only possible involvement of railroads envisioned by subsection (b)(3) is "their participation in diagnostic teams which may recommend the use or nonuse of crossing gates." *Id.* at 671.[13] That subsection further limits state and railroad decisionmaking by requiring automatic gates with flashing light signals for particular high-risk crossings, *id.* at 670, absent FHWA waiver, 23 C.F.R. § 646.214(b)(3)(ii). Subsection b(4) in turn makes any other initial determination of warning devices "subject to the Secretary's approval." 507 U.S. at 671. The Court accordingly stated a bright-line test for federal pre-emption:

> In short, *for projects in which federal funds participate in the installation of warning devices*, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The . . . regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Id. (emphasis added). The *Easterwood* Court found no pre-emption in the case before it only because the regulations did not apply: *i.e.*, federal funds did not participate in the installation of the devices in question, *id.* at 673, and it was not contended that the project was part of a federal-aid highway project, *id.* at 670 n.10.

Despite the clarity of *Easterwood*, and the clear majority rule among the courts of appeals that pre-emption of inadequate-device tort claims occurs whenever federal funding is approved for a project, see *supra* n.1, the dis-

[13] Some States, like Tennessee, do not allow railroad personnel on their diagnostic teams.

trict court denied petitioner's pre-emption defense on summary judgment. App. 36a-37a. Accordingly, the district court instructed the jury that petitioner's duty to exercise reasonable care in warning motorists of an oncoming train "may encompass providing additional warning devices if the crossing is more than ordinarily hazardous." C.A. App. 412. The jury found negligence on the part of both petitioner and the deceased, and assessed damages at $615,379. Because the jury assigned 70% of the negligence to petitioner, judgment was entered against petitioner for $430,765.30.

On appeal, the Sixth Circuit affirmed. It squarely and explicitly rejected the holdings of three other courts of appeals (the Fifth, Eighth, and Tenth Circuits) that "federal funding is both a necessary and sufficient condition for the preemption of state law" under *Easterwood*. App. 9a. Instead, it sided with the Seventh Circuit, and adopted that court's two-part test for *Easterwood* pre-emption: (1) whether federal funds participated in the installation of the devices in question, and (2) whether FHWA "actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4)." *Id.* at 13a (citing *Shots* v. *CSX Transp.*, 38 F.3d 304, 307-09 (7th Cir. 1994)).

The Sixth Circuit further rejected the argument that funding constitutes approval, even though by statute and regulation no funds can be approved unless safety devices comply with FHWA standards, 23 U.S.C. § 109(e); 23 C.F.R. § 630.106(a); the court reasoned that those provisions do no more than restate the requirements of 23 C.F.R. § 646.214(b)(3) and (4). App. 19a. Finally, it dismissed the argument that the statutory prohibition on discovery of "reports, surveys, schedules, lists, or data"

regarding crossing safety enhancements, 23 U.S.C. § 409, prevented railroads from raising pre-emption defenses under the Sixth and Seventh Circuits' approach. In the court's view, the necessary evidence that FHWA approved "of the use of passive warning devices at a particular crossing is not barred from discovery or admission into evidence by § 409." App. 22a. The Sixth Circuit stated that it was petitioner's burden to show, not only that the FHWA authorized federal funds to install protective devices, but also that the FHWA specifically evaluated the Oakwood Church Road crossing and approved the passive warning devices placed there as adequate for that crossing. Absent that proof, there would be no pre-emption. *Id.*

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE A DEEP AND MATURE 6-2 SPLIT AMONG THE COURTS OF APPEALS AND STATE SUPREME COURTS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

The resolution of conflicts among the federal courts of appeals and the state courts of last resort on an issue of federal law is one of the primary justifications for this Court to grant certiorari. See Sup. Ct. R. 10. On the question presented, there is a deep (6-2), acknowledged, and clean split among the lower courts, and this Court should resolve the important and recurring question of the requirements for pre-emption of inadequate-device state tort law claims.

The majority of federal courts of appeals and state supreme courts have properly followed this Court's command that, when the provisions of 23 C.F.R. § 646.214 (b)(3) and (4) "*are applicable*, state tort law is pre-empted." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 670 (1993) (emphasis added). It is beyond dis-

pute that those regulations are "applicable" whenever, upon FHWA project approval, "[f]ederal-aid funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i). Thus, as the Eighth Circuit has held, "[f]ederal funding is the touchstone of preemption in this area." *Bock* v. *St. Louis Southwestern Ry. Co.*, No. 97-4076, 1999 WL 437240, at *2 (8th Cir. June 30, 1999) (internal quotation marks omitted). *Accord Armijo* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996) ("In light of *Easterwood* . . . the issue in this case is whether federal funds participated in some significant way in the installation of warning devices at [a particular] crossing before . . . the date of the accident."); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995) ("Pursuant to *Easterwood*, the test we must apply is whether federal funds 'participated' in the installation of 'warning devices' at the . . . crossing. If they have, the . . . common law claims based on inadequate signalization are preempted."); *Ingram* v. *CSX Transp., Inc.*, 146 F.3d 858, 865 (11th Cir. 1998) (same); *Lubben* v. *Chicago Cent. & Pac. R.R. Co.*, 563 N.W.2d 596, 600 (Iowa 1997) (same); *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997) (same).

Under *Easterwood* and the majority rule, pre-emption therefore depends on one element: the applicability of regulations that cover the subject matter of state law. The regulations themselves are pre-emptive because they "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Easterwood*, 507 U.S. at 670. When a crossing is governed by 23 C.F.R. § 646.214(b)(4), as here, pre-emption flows from the regulatory mandate that selection of warning devices in federal aid projects shall be "subject to the Secretary's approval." *Easterwood*, 507 U.S. at 671. Thus, " 'the issue is not what warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and the state's hands.' " *Bock*, 1999 WL 437240, at *2 (quoting *Armijo*, 87 F.3d at 1192) (alteration omitted). The FHWA has the final authority to determine the selection of warning devices, and its authorization of federal funding for passive warning devices is "tantamount to a determination . . . that only passive, rather than active, warning devices [a]re sufficient." *Armijo*, 87 F.3d at 1190. The contrary approach of the Sixth and Seventh Circuits is at odds with the FRSA scheme: pre-emption does not depend on whether a federal "regulation or . . . order cover[s] the subject matter of the State requirement," 49 U.S.C. § 20106, but on whether there is specific evidence that an FHWA official complied with the regulations. See App. 13a-14a; *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 307-09 (7th Cir. 1994).

The majority-rule courts have uniformly and expressly rejected the *Shots* approach. See, *e.g.*, *Ingram*, 146 F.3d at 864-65; *Armijo*, 87 F.3d at 1191; *Elrod* v. *Burlington N. R.R. Co.*, 68 F.3d 241, 244 (8th Cir. 1995); *Hester*, 61 F.3d at 387 n.9. Now the Sixth Circuit has expressly sided with the Seventh Circuit and squarely rejected the majority rule. App. 17a ("We think it is illogical to read *Easterwood*[] as the Fifth, Eighth, and Tenth Circuits have done.").

There is thus now a clean and acknowledged circuit split on an issue, as the Sixth Circuit remarked, that is of great importance to railroads and plaintiffs alike. App. 17a-18a. The split is deep, and there are numerous opinions (sometimes multiple ones within a circuit) upon

which this Court may draw in resolving the issue. In sum, this question is ripe for the Court's review.

II. IMMEDIATE RESOLUTION OF THE QUESTION PRESENTED IS CRITICAL TO THE CONGRESSIONAL GOAL OF NATIONAL UNIFORMITY IN RAILWAY SAFETY LAW AND TO THE ADMINISTRATION OF THE FEDERAL CROSSINGS PROGRAM.

Even aside from the clear conflict in the lower courts, this Court should grant certiorari because of the need for "a uniform rule on the point." *Commissioner* v. *Bilder*, 369 U.S. 499, 501 (1962). In our system of federalism, it is inherently untenable for the law of some States but not others to be pre-empted. Respect for the dignity of the States demands that federal law treat them equally. Moreover, the disuniformity bred by the Sixth Circuit's decision is contrary to congressional policy that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, this Court should act now to resolve the question presented and define a single national pre-emption rule.

The need for this Court's review is all the more urgent because of the implications of the Sixth Circuit's decision for the proper administration of the Section 130 crossing program. That program has been a resounding success. Federal funds have accounted for most of the $3 billion expended on grade crossing safety involving nearly 30,000 projects between 1974 and 1995. Federal Highway Administration, U.S. Dep't of Transportation, *Accidents That Shouldn't Happen: A Report of the Grade Crossing Safety Task Force to Secretary Federico Pena* (Mar. 1, 1996) <http://www.fhwa.dot.gov/omc/contents.htm>, at 3 ("*1996 Task Force Report*"). Despite increased highway and rail traffic, the Section 130 program has contributed to a precipitous decline in the number of crossing accidents and fatalities: there were more than 12,000 accidents and 1,500 fatalities at railway crossings in 1972, but only 3,865 accidents and 461 fatalities in 1997. *Id.*; Federal Railroad Administration, U.S. Dep't of Transportation, *Railroad Safety Statistics Annual Report 1997* 2-2 (1998) (Table 2-1) ("*1997 Safety Report*"). The FHWA has "estimated that since its inception, the Section 130 Program has helped save almost 9,000 lives and prevent nearly 40,000 injuries." *1996 Task Force Report*, at 3.

A principal reason for the success and cost-effectiveness of the section 130 program has been the requirement (supported by federal funds, see 23 C.F.R. § 924.9(c)) that the States perform systematic crossing surveys and data collection and analysis, and develop processes for conducting engineering studies and prioritization of remedial projects based on relative hazard, accident reduction potential, and cost. See 23 U.S.C. § 130(d); 23 C.F.R. § 924.9(a)-(b). The thrust of the section 130 program, and the pre-emptive 1975 FHWA regulations defining federal standards and procedures for ensuring the adequacy of warning devices selected by the State, has been to make the installation of federally funded warning devices a matter of rational, expert determination based on hard evidence and scientific analysis—rather than the vagaries of tort judgments by lay jurors in the aftermath of a fatality against the only entity normally capable of being sued (the railroad), in trials where all the evidence and analyses relied upon by the experts in selecting devices for that crossing are excluded by operation of law, see 23 U.S.C. § 409. See *Union Pac. R.R. Co.* v. *Sharp*, 952 S.W.2d 658, 667 (Ark. 1997).

The approach of the Sixth and Seventh Circuits cannot reasonably be administered, and subjects railroads to arbitrary judgments. The bright-line majority rule clearly reflects the reasonable scheme of the FHWA's 1975 adequate-device regulations, as verified by *Easterwood*: when the FHWA approves installation of the devices with federal funds, the crossing is in effect "federalized" and any state-law duty of the railroad to determine the adequacy of warning devices is pre-empted; the railroad's involvement is limited to participation in a diagnostic team that the State may assemble for a crossing, *Easterwood*, 507 U.S. at 671, but only if such participation is invited by the State. Cf. *MUTCD*, at 8D-1 ("The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations."). After the federally funded devices are installed, it is the State that has the duty under the section 130 crossing program to monitor the crossing to determine if additional devices are needed, and to schedule any required upgrade projects. This scheme is sound public policy: each entity is at all times aware of its responsibility for protecting the public, and is not left to litigate an alleged responsibility at some indefinite future time after someone is killed or injured.

Under the rule of the Sixth and Seventh Circuits, however, railroads are now not only subject to tort actions for the alleged inadequacy of devices selected by the State and funded by the FHWA, but are also precluded by 23 U.S.C. § 409 from discovering or introducing into evidence any of the data, reports, or surveys that might prove that reasonable care was used in the selection of the devices. The Sixth Circuit purports to preserve a pre-emption defense for railroads of introducing specific evidence of FHWA approval of a device at a particular crossing. See App. 13a-14a. But such crossing-specific

evidence does not generally exist because the device approvals are subsumed within the FHWA authorization of federal funding for the devices—which, by statute and regulation, cannot be given without approving the adequacy of the devices. See 23 U.S.C. § 109(e) ("no funds shall be approved . . . unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation"); 23 C.F.R. § 630.106(a); *Hester*, 61 F.3d at 387. If the rule of the Sixth and Seventh Circuits stands, railroads can only defend themselves by engaging in wasteful duplication of the States' survey and hazard analyses of the nation's more than 160,000 public grade crossings, *1997 Safety Report*, at 9-2 (Table 9-2). This is contrary to reason and the federal scheme that Congress crafted. Given the importance of the Sixth and Seventh Circuits (the States of which contain 15% of the nation's public crossings, *id.*, often on heavily traveled roads), and the deep conflict among the lower courts, this Court should decide the question presented now.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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August 20, 1999

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 96-6371

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Plaintiff-Appellee,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellant,

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY;
NORFOLK SOUTHERN CORPORATION,
Defendants.

Appeal from the United States District Court
for the Western District of Tennessee at Jackson.
No. 94-01212—James D. Todd, District Judge.

Argued: February 5, 1998
Decided and Filed: April 13, 1999

Before: BATCHELDER, MOORE, and CLAY, Circuit Judges.

OPINION

ALICE M. BATCHELDER. This action arises out of an accident that occurred in Gibson County, Tennessee, on October 3, 1993. Eddie Shanklin collided with, and was killed by, one of Norfolk Southern's trains while he was driving his car east across the Oakwood Church Road Crossing. Dedra Shanklin (Eddie Shanklin's widow) brought claims—based on both Tennessee common law and statutory law—alleging that the accident was the result of Norfolk Southern's negligence in: (1) operating its train at an excessive speed; (2) failing to sound the horn or apply the brakes in a timely fashion; (3) failing to remove vegetation from the area surrounding the crossing; (4) failing to install a "ditch light" on the train; and (5) failing to install adequate warning devices at the crossing.

Norfolk Southern moved for summary judgment, claiming that Shanklin's claims are preempted by the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. §§ 421-447, *repealed and recodified as* 59 U.S.C. §§ 20101-20153. On April 17, 1996, the district court granted summary judgment to Norfolk Southern on the excessive speed and "ditch light" claims, holding that they were preempted by the FRSA and Boiler Inspection Act, respectively, but denied the motion in all other respects.

Thus, the claims concerning failure to apply the brakes, failure to sound the horn, failure to remove vegetation, and failure to install adequate warning devices went to a jury trial beginning on April 29, 1996. On May 7, 1996, the jury returned a verdict finding that Shanklin and Norfolk Southern were both guilty of negligence. The jury assigned 30% negligence to Shanklin and 70% to Norfolk Southern. The jury further found the damages to be $615,379.00. Accordingly, a judgment was entered by the district court awarding Shanklin $430,765.30.

Norfolk Southern timely filed a motion for judgment as a matter of law or, in the alternative, for a new trial. The motion was denied on September 13, 1996, and Norfolk Southern timely filed a notice of appeal on September 25, 1996.

I.

A.

In 1987, the Tennessee Department of Transportation ("TDOT") installed reflectorized crossbucks at the Oakwood Church Road Crossing as part of an improvement project including 196 crossings in 11 West Tennessee counties. Terry Cantrell, the TDOT employee in charge of Tennessee's railroad crossing programs, testified that the improvements at the Oakwood Church Road Crossing were undertaken as part of a federally funded "minimum protection program" to bring crossings into compliance with 23 C.F.R. § 130(d). That section mandates that a state establish a schedule of crossing safety projects and that "[a]t a minimum, such schedule shall provide signs for all railway-highway crossings." 23 U.S.C. § 130(d). No evidence was produced that any federal employee was involved in the decision to install crossbucks, as opposed to active warning devices such as gates and flashing lights, at the Oakwood Church Road Crossing.

Furthermore, evidence was introduced at trial showing that the Oakwood Church Road Crossing exhibited the following dangerous conditions: (1) high speed train operations combined with limited sight distance; (2) moderately high railroad and highway traffic; (3) trucks carrying hazardous materials; and (4) a prior collision at the crossing.

B.

Eddie Shanklin was driving east along Oakwood Church Road at a speed of 20 miles per hour when he was struck

by a Norfolk Southern train at the Oakwood Church Road Crossing. Archie Brunham, former head of the Georgia Department of Transportation, explained at trial that Shanklin did not have enough time to stop the car after seeing the train and that he was not able to hear the train whistle because his windows were rolled up, his heater fan was on, and his radio was playing. Burnham explained that in order to stop, Shanklin needed to have seen the train and to have started applying the brakes no closer than 135 feet from the tracks. Shanklin could not have seen the train until he was a mere 94 feet from the tracks, however, because of vegetation and the proximity of a house to the tracks. Indeed, the engineer of the train testified that he never saw Shanklin's vehicle prior to the accident, and the other two crew members testified that they only saw Shanklin's car after it was too late to stop.

Burnham also testified that "very possibly sight and sound of the approaching train could have been received by Shanklin at the same point in time. And as I've demonstrated earlier that point in time, 94 feet away from the rail, is just too late." When Norfolk Southern tried to rebut Burnham's horn-related testimony with an expert of their own, the results were less than stellar. Tom Rose opined that the train horn could have been heard at 400 feet, but he reached that opinion by doing tests in a car different from Shanklin's, without radio or heater on, and sitting still on a flat road in Texas. Rose played a tape recording at trial, which he expected would establish that Mr. Shanklin would have been able to hear the train horn. The demonstration, however, was not very successful. At one point, Rose apologized:

> I have a little egg on my face, as you heard . . . the recording, as you can tell, is terrible. It's extremely muddy. There was a malfunction, but I think you can still tell that the horn is—you can tell the horn is there sometimes and not there at others.

Expert testimony further suggested that the headlamp on the train may have been inadequate to warn Shanklin of the train's approach. Burnham pointed out how the existence of street lights along the tracks could confuse a driver into thinking that the train's headlamp was just another street light. Burnham further testified that the headlamp on Norfolk Southern's train was designed "to give indication of the illumination in front of the train as opposed to being a warning to the traffic that here comes the train."

II.

A.

Norfolk Southern contends that Shanklin's state law crossing warning device claim was preempted by the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434), and regulations issued under the Highway Safety Act, 23 U.S.C. § 101 *et seq.*

The FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. As an aid to developing solutions to safety problems posed by railroad grade crossings, the FRSA provides that the Secretary of Transportation "as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing [existing] laws and regulations." 49 U.S.C. § 20103.

Not long after enacting the FRSA, Congress enacted the Highway Safety Act of 1973, which makes federal funds available to the states to improve grade crossings. As a prerequisite to receiving federal funds, a state must "conduct and systematically maintain a survey of all high-

ways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d). States may have to meet other requirements, as specified by regulations promulgated by the Secretary through the Federal Highway Administration ("FHWA") under the FRSA and the Highway Safety Act. *See* 23 C.F.R. pts. 646, 655, 924, 1204.

The FRSA specifically provides for preemption, stating:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106.

In *CSX Transportation, Inc. v. Easterwood*, the Supreme Court addressed the preemptive force of the FRSA with respect to state warning device claims for accidents at grade crossings. 507 U.S. 658 (1993). Very much like the present case, the plaintiff in *Easterwood* had been killed by one of defendant's trains at a grade crossing. Easterwood's widow brought a state tort claim for failure to maintain adequate warning devices at the crossing. The Supreme Court held that the state law claims in that case were not preempted by the FRSA.

The *Easterwood* Court first held that the regulations contained in 23 C.F.R. §§ 646.214(b)(3) and (4) provided the only potential sources for preemption in the circumstances of that case. Those sections apply, however, only to grade crossings in which "Federal-aid funds participate in the installation of the [warning] devices."

See 23 C.F.R. §§ 646.214(b)(3) and (4). With respect to such federally funded crossings or federally funded projects to improve or create such crossings, § 646.214 (b)(2) states that "the crossing shall not be opened for unrestricted use by traffic or the project accepted by the FHWA until *adequate warning devices* for the crossing are installed and functioning properly." 23 C.F.R. § 646.214(b)(2) (emphasis added).

Subsections (b)(3) and (4) outline the types of warnings deemed *adequate* for certain types of crossings. Subsection (b)(3)(i) mandates that automatic gates with flashing lights be installed at all grade crossings where one or more of the following conditions exists:

> (A) Multiple main line railroad tracks.
>
> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.
>
> (C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.
>
> (D) A combination of high speeds and moderately high volumes of highway and railroad traffic.
>
> (E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.
>
> (F) A diagnostic team recommends them.

23 C.F.R. § 646.214(b)(3)(i). Subsection (b)(3)(ii) further provides that "[i]n individual cases where a diagnostic team justifies that gates are not appropriate, FHWA

may find that the above requirements are *not applicable*." 23 C.F.R. § 646.214(b)(3)(ii) (emphasis added). If the requirements of (b)(3) are not applicable, then (b)(4) applies. According to subsection (b)(4), "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is *subject to the approval of FHWA*." 23 C.F.R. § 646.214(b)(4) (emphasis added).

Taken together, then, subsections (b)(3) and (4) make it clear that there are only two types of crossings for which some federal funds have been used to supply warning devices: those that require active warnings, and those for which the absence of active warnings has been approved by the FHWA. In other words, a crossing must have active warning devices (*e.g.*, automatic gates and flashing lights), unless the crossing falls under one of two exceptions: (1) a diagnostic team analyzes the crossing and determines that no active warning devices are needed, or (2) none of the dangerous conditions listed in (b)(3) exists at that crossing. If either of the exceptions applies, however, the crossing cannot be in compliance with subsection (b)(4) until the passive warnings adopted for the crossing have been approved by the FHWA. Accordingly, the *Easterwood* Court held that subsections (b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. Indeed, [these sections] effectively set the terms under which railroads are to participate in the improvement of crossings." *Easterwood*, 507 U.S. at 670.

The state law claims were not preempted in *Easterwood*, however, because the facts of that case failed to

establish the preconditions for the application of either subsection (b)(3) or (b)(4). Specifically, the record failed to "establish that federal funds 'participate[d] in the installation of the [warning] devices.'" *Id.* at 672 (brackets in original). State law is preempted only if either subsection (b)(3) or (b)(4) applies, and those subsections apply only if federal funds participated in the installation of warning devices at a particular crossing. Because federal funding was absent in *Easterwood*, the state law claim was not preempted.

Courts have not uniformly interpreted the holding in *Easterwood*. The Fifth, Eighth, and Tenth Circuits have each interpreted *Easterwood* to hold that federal funding is both a necessary and a sufficient condition for the preemption of state law. *See Armijo v. Atchison, Topeka and Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996) ("In light of *Easterwood* . . . the issue in this case is whether federal funds participated in some significant way in the installation of warning devices at [a particular] crossing before . . . the date of the accident."); *Hester v. CSX Transp., Inc.*, 61 F.3d 382, 386 (5th Cir. 1995) ("Pursuant to *Easterwood*, the test we must apply is whether federal funds 'participated' in the installation of 'warning devices' at the . . . crossing. If they have, the . . . common law claims based on inadequate signalization are preempted."); *Elrod v. Burlington N. R.R. Co.*, 68 F.3d 241, 244 (8th Cir. 1995) ("Federal funding is the touchstone of preemption in this area because it indicates that the warning devices have been deemed adequate by federal regulators."). Although *Hester* and *Elrod* dealt with (b)(4), rather than (b)(3) crossings, the opinions in those cases leave little room for doubt that the analysis would be the same in (b)(3) cases. Put simply, these circuits find that preemption analysis begins and ends with the federal funding question.

The Seventh Circuit, on the other hand, has interpreted *Easterwood* to hold that preemption analysis begins, but does not end, with the federal funding issue. See Shots v. CSX Transp., 38 F.3d 304 (7th Cir. 1994). The *Shots* Court framed the discussion by first asking "what if anything more must be shown besides federal financial assistance to knock out a state common law or statutory safety requirement for grade crossings . . . ." *Id.* at 305. Judge Posner, writing for the Seventh Circuit in *Shots*, found it significant that the *Easterwood* Court never got around to enumerating additional requirements for preemption, because the threshold requirement, federal funding, was absent in that case. *Id.* at 307. Judge Posner correctly noted that there is a difference between holding that federal funding is a necessary condition to preemption and holding that federal funding is a sufficient condition. *Id.*

Despite reaching different conclusions, the courts interpreting *Easterwood* have all focused on the same passage from that opinion:

> In either case [(b)(3) or (b)(4)], the Secretary has determined that the railroads shall not be made to pay any portion of installation costs. In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which . . . seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Easterwood, 507 U.S. at 671 (internal citation omitted). *See Shots*, 38 F.3d at 306-07 (quoting the above passage as critical to understanding of the holding in *Easterwood*); *Hester*, 61 F.3d at 386 (same); *Elrod*, 68 F.3d at 243-44 (citing the page from *Easterwood*, but not quoting the passage; also citing to the discussion of that passage in *Hester*); *Armijo*, 87 F.3d at 1190 (citing the page from *Easterwood*, but not quoting the passage).

Based on this language from *Easterwood*, the Fifth, Eighth, and Tenth Circuits all agree that "the Secretary of Transportation's authorization of passive warning devices was tantamount to a determination . . . that only passive, rather than active, warning devices were sufficient." *Armijo*, 87 F.3d at 1190. These courts reason that federal law preempts state law at a particular crossing once the Secretary has made a determination of the kinds of warning devices that are needed at that crossing. Federal funding is merely a proxy for such a determination; *i.e.*, federal funding equals a constructive determination by the Secretary that the types of devices being funded are adequate for the crossing being funded. Once devices for which there is any federal funding have been installed, the argument goes, state law ceases to apply. As the *Hester* Court put it, "The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary approved and authorized that expenditure, which in turn legally presupposes that the Secretary determined that the safety devices being installed were adequate to their task." 61 F.3d at 387.

With respect to the same passage from *Easterwood*, however, the Seventh Circuit stated:

> Read literally, as a blanket statement that the regulation prescribes *the* safety devices for all crossings at which federal funds have been used for the installation of some safety device, this passage supports the railroad's position. But we do not think the literal

> reading is the correct one. The regulation does not specify particular safety devices at particular crossings. Rather, it establishes criteria for determining which safety devices are required at particular crossings. Because the Supreme Court in *Easterwood* found that federal funds had not participated in the project at issue in that case, it had no occasion to consider the application of the regulation to particular crossings.

Shots, 38 F.3d at 307. According to the Seventh Circuit, therefore, the issue in *Easterwood* "was whether the regulation was applicable by virtue of federal financial participation, not whether the regulation, if applicable, actually prescribed a particular safety device at a particular crossing." *Id.*

Despite establishing that federal funds had participated in the installation of reflectorized crossbucks at the crossing at issue in that case, the *Shots* Court found that the Secretary had not made a determination that reflectorized crossbucks were adequate for that particular crossing. Rather, the crossbucks had been installed as a result of an agreement between the State of Indiana and the Secretary of Transportation to place reflectorized crossbucks at 2,638 crossings that either lacked crossbucks altogether, or lacked the more effective, reflectorized variety. *Shots*, 38 F.3d at 306. This agreement to bring all the crossings in Indiana up to a minimum safety level was not the same as a determination by the Secretary that one particular crossing, out of the 2,638 covered, was adequately protected by nothing more than the minimum. As Judge Posner pointed out:

> Minimum is not a synonym for optimum, or even adequate. . . The task was to maximize grade-

> crossing safety in the state as a whole, subject to a budget constraint, so it was to be expected that adequate safety might be sacrificed at some crossings to enable minimum safety to be achieved at all. . . . [Thus,] the agreement was a step on the road to adequate safety rather than a determination by the State of Indiana or the federal Secretary of Transportation as to what safety devices would be adequate at each of the thousands of crossings covered by it.

Id. at 308-09.

Thus, the Seventh Circuit in *Shots* announced a two-part test for preemption in grade crossing cases: (1) establish whether subsection (b)(3) or (4) applies at all (*i.e.*, whether federal funding participated in the installation of warning devices at the crossing in question); and (2) establish whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4). In other words, a court must first establish that (b)(3) and (b)(4) are applicable, and then establish that either (b)(3) or (b)(4) was, in fact, applied.

Although alone among circuit courts, the Seventh Circuit is not the only federal court to refuse to accept the fiction of constructive approval; that is, the fiction that federal funding is the equivalent of a determination that the devices being funded are adequate protection at a particular crossing. In *Heizelman v. Southern Pacific Transportation Co.*, the District of Oregon adopted the findings and recommendation of the magistrate judge, who had explained:

> To characterize the happenstance method by which FHWA funds were approved for the [safety measures

> in question] as an act which triggered preemption is to ignore, it seems, the whole point of the *Easterwood* doctrine. . . . [I]t makes no sense to find that the railroad has been excused from its common law duty to maintain safe crossings simply because, without any analysis by anyone regarding what devices were required at [the particular crossing] under the federal regulatory scheme, FHWA signed off on a request for funds, a portion of which came to be applied to defray the cost to the county of installing these [safety measures].

Heizelman v. Southern Pac. Transp. Co., Case No. 91-6134-TC, Findings and Recommendation of the Magistrate Judge, slip op. at *8-*9 (D. Or. Dec. 9, 1993). According to the *Heizelman* Court, "[t]he key point is that there must be an evaluation of the adequacy of the warning devices in place at a crossing under both subsections (b)(3) and (b)(4) before preemption applies." *Heizelman v. Southern Pacific Transportation Co.*, Case No. 91-6134-TC, Order of the District Court, slip op. at *7 (D. Or. June 8, 1994).

The vital difference between the approach adopted by the Fifth, Eighth, and Tenth Circuits and that adopted by the Seventh Circuit is that the former accepts the doctrine of constructive approval, while the latter rejects it. The fiction of constructive approval, noted Judge Posner, is not only unrealistic, but unwise:

> Indeed, it would have been an extraordinary act of irresponsibility for the Secretary of Transportation, by approving the agreement, to preclude tort liability for the railroad's failing to have active warnings at any of the thousands of crossings covered by the agreement, or otherwise to prevent the state from requiring adequate safety devices at the busiest or

> most dangerous of these crossings, when no one in the federal government had made a determination that the improvements to be made would bring all the crossings up to a level of safety adequate to satisfy federal standards.

Shots, 38 F.3d at 309.

For the reasons that follow, we agree with the Seventh Circuit.

According to the Supreme Court, preemption analysis must "start with the assumption that the historic police powers of the States [were] not to be superseded by [the] Federal Act unless that [was] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The doctrines of federalism and judicial restraint both counsel courts against lightly casting aside the "basic assumption that Congress did not intend to displace state tort law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Moreover, "the regulation of health and safety matters is, primarily and historically, a matter of local concern." *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985). Thus, the presumption against federal preemption of state law is "particularly apt" in the area of railroad safety. *Rogers v. Consolidated Rail Corp.*, 948 F.2d 858, 859 (2d Cir. 1991). Indeed, the *Easterwood* Court, itself, noted "the relatively stringent standard set by the language of [the FRSA's preemption clause] and the presumption against pre-emption . . . ." *Easterwood*, 507 U.S. at 668.

The presumption against preemption looms even larger in the present context, where no analogous federal remedy exists. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464

U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."). In a case such as this one, a finding of preemption relieves the railroad of any responsibility for the types of warning devices at a particular crossing (or set of crossings). Removing responsibility from the railroad is appropriate in cases where the federal government has assumed responsibility by stepping in and making its own determination, but interpreting *Easterwood* too broadly (*i.e.*, finding preemption prematurely) will remove responsibility from the railroads before the federal government has stepped in. In that case, no one is responsible for the safety of the motorists who use the crossing; we find in the FRSA no clear intent to achieve such an effect.

Of course, the Supreme Court has already determined that the FRSA can and does preempt state law, where applicable, and this Court is bound by that determination. The Supreme Court did not, however, determine the preclusive effect of the FRSA in cases, such as the present one, where the record establishes nothing more than the bare fact that federal funding participated in the installation of warning devices at a particular crossing. It is appropriate, therefore, that this Court bear in mind both the strong presumption against preemption and the mandate that, even where Congress has explicitly provided for preemption, courts should adopt "a narrow interpretation of such an express command . . . ." *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485 (1996).

The Seventh Circuit's more reasoned (and more reasonable) approach succeeds on this score, while the approach of the other circuits fails. The Seventh Circuit's narrow approach limits federal preemption in grade crossing cases to only those instances where federal regulatory authority

has been exercised. The more expansive approach of the other circuits turns any decision to spend federal money on railroad warning devices into an eradication of state sovereignty, regardless of how or why the decision was made.

In addition to being in harmony with the presumption against preemption, the narrow approach is more faithful to the Supreme Court's holding in *Easterwood*. We think it is illogical to read *Easterwood*, as the Fifth, Eighth, and Tenth Circuits have done, for the broad proposition that state law is preempted whenever and wherever federal funding has participated in the installation of railroad devices, because the holding in that case did not begin to go so far. Indeed, the Supreme Court never reached the issue because there was no evidence in that case of federal funding.

Moreover, the narrow approach is more consistent with the FRSA's goals of promoting railroad safety, reducing railroad accidents, and reducing deaths and injuries as a result of such accidents. As Judge Posner noted in *Shots*, focusing on federal funding as the only criterion for preemption would, in many cases, have the effect of removing the protections of state law from large numbers of crossings which have not yet been analyzed in accordance with subsections (b)(3) and (4). These subsections set up specific guidelines for the installation of warning devices at grade crossings—guidelines which, if followed, should lead to safer crossings and fewer accidents.

Subsections (b)(3) and (4) embody a system of incentives designed to increase safety at grade crossings. In exchange for improving warning devices at a particular crossing, the states get federal funding for the improvement and the railroad (in addition to having the improvement underwritten by a state request for federal money)

Norfolk Southern and Amicus AAR present several other arguments in favor of preemption. First, they argue that the fiction of constructive approval is statutorily mandated by 23 U.S.C. § 109 and 23 C.F.R. § 630.114(b) (1996) (amended and recodified at 23 C.F.R. § 630.106(a) (effective Feb. 14, 1997)). Section 109(e) provides that "[n]o funds shall be approved by expenditure . . . unless proper safety protective devices complying with the standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad crossing. . . ." 23

This is not to say that the expansive approach lacks any redeeming value. Brightline rules are both easier to understand and easier to administer. Moreover, the expansive approach would likely reduce the number of warning device tort claims, to the relief of overloaded state courts and the dismay of personal injury lawyers. One need look no further than the Amicus Brief of the American Association of Trial Lawyers to see how important the preemption issue is to personal injury lawyers.

prize only if they have, in fact, taken the desired action. Under the expansive approach, however, railroads get the prize whether or not they have taken the desired action. It takes nothing more than a rudimentary understanding of economics to see that an incentive-based system does not work unless the reward is somehow tied to performance of the desired action.

receives immunity from state tort actions related to that crossing. In effect, the railroads get a huge benefit if they work with the state to take the desired action. As evidenced by the Amicus Brief filed by the American Association of Railroads ("AAR"), immunity from state tort actions is no small prize. Under the narrow approach announced by the Seventh Circuit, railroads receive that

U.S.C. § 109(e). Section 630.114(b) states that "FHWA issuance of an authorization to proceed with the work on any phase of a highway project . . . can be given only after applicable prerequisite requirements of Federal laws, and implementing regulations and directives have been satisfied." 23 C.F.R. § 630.114(b).

From these two sources, Norfolk Southern and AAR argue that any approval of federal funding for grade crossing improvement is tantamount to a decision that the improvement being made is adequate to protect against the risk at a particular crossing; hence, state law claims are preempted. Although the cited provisions may demonstrate that the TDOT program was not carried out in compliance with applicable law, these provisions do little more than reiterate the requirements of 23 C.F.R. §§ 646.214(b)(3) and (4). They do not require us to accept the fiction of constructive approval, and we decline to do so.

Norfolk Southern further argues that railroads will be unable to meet the burden of proof required by the narrow appoach. It is well established that the party seeking shelter under the umbrella of preemption bears the burden of showing that preemption applies. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 255 (holding that the "burden is on the party claiming preemption to demonstrate its existence"); *Easterwood*, 507 U.S. at 670 ("[P]etitioner has failed to establish that the regulations apply to these cases, and hence we find respondent's grade crossing claim is not pre-empted."). According to Norfolk Southern, the narrow approach would require a railroad to show first that the crossing without active warning devices was federally funded and then that a diagnostic team had determined that active warnings were unnecessary.

Such a showing would be impossible, argues Norfolk Southern, because 23 U.S.C. § 409 prohibits the discovery of or admission into evidence of "reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying[,] evaluating, or planning the safety enhancement of . . . railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds . . . ." 23 U.S.C. § 409 (footnote omitted). Apparently, this provision was designed "to foster the free flow of safety-related information between the railroad industry and its regulatory bodies by precluding the possibility that such information would be discoverable and admissible in civil suits." *Sawyer v. Illinois Cent. Gulf R. Co.*, 606 So.2d 1069, 1073 (Miss. 1992) (citation omitted). *See also Claspill v. Missouri Pac. R. Co.*, 793 S.W.2d 139, (Mo.), *cert. denied* 498 U.S. 984 (1990); *Miguez v. Southern Pac. Transp. Co.*, 645 So.2d 1184 (La. Ct. App. 1994).

The narrow approach is unworkable, the argument goes, because § 409 renders it impossible for a railroad to demonstrate that a diagnostic team determined active warnings to be unnecessary at a crossing where (b)(3) conditions exist. Yet, railroads need not depend on diagnostic team reports at all. Subsections (b)(3) and (4) unambiguously require FHWA approval for any crossing that does not have active warnings. The reason for the absence of active warnings—*i.e.*, either the dangerous (b)(3) conditions do not exist, or such dangerous conditions do exist, but a diagnostic team has determined active warnings to be unnecessary—is quite irrelevant. Either subsection (b)(3) is applicable, in which case active warnings are required, or it is not applicable, in which case FHWA approval is required.

We conclude that Norfolk Southern misreads the requirements of § 409. As we have noted above, that section, in pertinent part, prohibits discovery and admission into evidence of "reports, surveys, schedules, lists, or data compiled or collected . . . pursuant to sections 130, 144, and 152 of this title . . . ." 23 U.S.C. § 409. Section 130, dealing with payment of costs of railway-highway crossings, among other things requires the state to conduct particular surveys, *see* 23 U.S.C. § 130(d); to establish and implement particular schedules, *see id.*; and to make annual reports which include lists and compilation and analysis of data, *see* 23 U.S.C. § 130(g). Section 144, dealing with highway bridge replacement programs, among other things requires the Secretary, in conjunction with the states, to inventory and classify bridges, *see* 23 U.S.C. § 144(b), and requires the Secretary to submit to Congress biennielly his report inventorying and classifying the bridges, *see* 23 U.S.C. § 144(i). Section 152, dealing with elimination of highway hazards, among other things requires each state to conduct engineering surveys of public roads and to establish and implement schedules of projects for their improvement, *see* 23 U.S.C. § 152(a); and to submit an annual report to the Congress on the progress being made to eliminate highway hazards, *see* 23 U.S.C. § 152(g). This annual report is required to contain compilations and analysis of extensive data, and is the basis for the annual report that the Secretary of Transportation must file with the Congress. *See id.* Section 409 explicitly prohibits these "reports, surveys, schedules, lists, or data compiled or collected" from being discovered and admitted into evidence. Section 409 does not, however, mention the Secretary's approval of any project as to which these "reports, surveys, schedules, lists, or data" have been "compiled or collected," although both §§ 144 and 152 explicitly provide for the Secretary to issue

approvals for these projects, *see* 23 U.S.C. §§ 144(d) and (k) and 152(b). We are satisfied that the FWHA's approval, *i.e.*, the approval of the Secretary or his agent, of the use of passive warning devices at a particular crossing is not barred from discovery or admission into evidence by § 409.

In order for preemption to apply, Norfolk Southern was required to demonstrate that either subsection (b)(3) or (b)(4) was applied to the Oakwood Church Road Crossing. Because the crossing had passive, rather than active, warnings, Norfolk Southern was forced to demonstrate the application of (b)(4). In order to do so, however, Norfolk Southern needed to show that the FHWA approved passive warnings at the Oakwood Church Road Crossing. Norfolk Southern failed to do so, because, as we have held, federal funding alone is insufficient to make such a showing.

For these reasons, we AFFIRM the lower court's decision that federal law does not preempt Shanklin's state law negligence claim for failure to maintain adequate warning devices.

B.

In addition to arguing that Shanklin's claims are preempted by the FRSA, Norfolk Southern contends that the evidence failed, as a matter of law, to establish Shanklin's right to recover. The evidence was insufficient, argues Norfolk Southern, in that it failed to establish that Shanklin's comparative fault was less than its own. Under Tennessee law, a plaintiff may recover if his negligence is less than that of the defendant, but not if his negligence equals or exceeds that of defendant.

In a state law action in which diversity forms the basis for federal jurisdiction, this Court looks to the state law to determine the standard under which to review a motion

for a directed verdict. *See Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 56 F.3d 726, 733 (6th Cir. 1995); *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 726 (6th Cir. 1994). This case is governed by the laws of Tennessee. Under Tennessee law, a motion for judgment as a matter of law may be granted only if the court, after construing the evidence most strongly in favor of the non-movant and discarding all countervailing evidence, determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence, and those conclusions are adverse to the non-movant. *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994). "If there is any doubt as to the proper conclusion to be drawn from the evidence, the motion must be denied." *Id.* In other words, Norfolk Southern will win on this issue only if the evidence is such that there is no way that a reasonable jury could have found in Shanklin's favor. This is an exceptionally heavy burden, and Norfolk Southern fails to carry it.

Norfolk Southern contends that the only conclusion reasonable minds could have reached in this case is that Shanklin was at least as negligent as Norfolk Southern, or that Norfolk Southern was not negligent at all. Specifically, Norfolk Southern claims that Shanklin (1) should have seen the train coming, (2) should have heard the whistle blowing, and, therefore, (3) should have yielded the right of way as required by Tennessee law.

Evidence was presented at trial that Shanklin could have had an unobstructed view of the train when he was 85 feet from the crossing, thus giving him a mere 2.7 seconds in which to stop the car and avoid the collision. Moreover, there was extensive expert testimony that the limited sight distance caused by vegetation, terrain, and the proximity of a house created a "trap" which made it impossible for Shanklin to see the train in time to avoid

the collision. Experts also testified that the train's headlamp was inadequate because it pointed straight down the track, rather than at an angle that would provide warning to a person approaching the crossing. There was also testimony that the headlamp could be confused with an ordinary street light if seen at night. Indeed, the engineer of the train testified that he never saw Shanklin's vehicle prior to the accident, and the other two crew members testified that they only saw Shanklin's car when it was too late to stop.

As for Shanklin's ability to hear the train, the record shows that he had his heater fan on, his car windows up, and his radio playing. Norfolk Southern chose to use at trial a taped recording of the train's whistle to demonstrate that Shanklin could have heard the train. The jury could not hear the whistle, despite the fact that the tape was made in a car without the radio or heater fan on while the car was sitting still. Norfolk Southern did not give the jury much to help it arrive at the conclusion Norfolk Southern now claims is inescapable.

Although no direct evidence was presented about the precautions taken by Shanklin as he approached the crossing, the record did establish that he was driving a mere 20 miles per hour. This, combined with the evidence about his inability to see and hear the train, makes it quite clear that reasonable minds could differ as to whether and to what extent Shanklin was negligent. So, too, reasonable minds could differ about whether and to what extent Norfolk Southern was negligent. Under these circumstances—looking at the evidence in the light most favorable to Shanklin and discarding all countervailing evidence—we cannot say that reasonable minds could not differ regarding the amount of negligence of both Shanklin and Norfolk Southern.

CONCLUSION

For the reasons stated above, the decision of the district court is **AFFIRMED** in all respects.

APPENDIX B

[Filed Apr. 17, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

No. 94-1212

DEDRA SHANKLIN, Individually and as Next Friend of JESSIE GUY SHANKLIN,
Plaintiff,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a wrongful death action filed by the Plaintiff, Dedra Shanklin, as the surviving spouse of Eddie Shanklin, deceased. The action was filed by the Plaintiff individually and as the mother of Jessie Guy Shanklin, against the Defendant, Norfolk Southern Railway Company. Jurisdiction of the court is based on diversity of citizenship. 28 U.S.C. § 1332. Before the court are motions for summary judgment on behalf of both the Plaintiff and the Defendant.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Celotex Corp.*, 477 U.S. at 323.

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). However, the court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. *Id.* at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

This action arises out of an accident that occurred in Gibson County, Tennessee, on October 3, 1993. While driving his vehicle east on Oakwood Road, Eddie Shanklin collided with one of the Defendant's trains at the Oakwood Road railroad crossing, resulting in his death. The Plaintiff's claims are based on both Tennessee common law and statutory law, and include allegations that the accident was the result of the Defendant's negligence in operating its train at an excesive rate of speed and failing to sound the horn or apply the brakes in a timely fashion; failing to remove vegetation from the area surrounding the crossing; failing to install a "ditch light" on the train; and failing to install adequate warning devices at the crossing. Defendant has moved for summary judgment on the grounds that Plaintiff's claims are preempted by federal railroad safety regulations. The federal regulations regarding railroad safety standards were promulgated pursuant to the authority granted by the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. §§ 421-447. On July 5, 1994, this Act was repealed by Pub. L. 103-272, 108 Stat. 1379, and revised and recodified at 49 U.S.C. §§ 20101-20153. The statute governing federal pre-emption is 49 U.S.C. § 20106:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;

> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

EXCESSIVE SPEED, INADEQUATE HORN AND BRAKING

It appears to be undisputed that, at the time of the accident, the train involved was traveling at a speed of 40 miles per hour, and that the track at the Oakwood Road crossing is class IV track. Federal regulations set the speed limit for class IV track at 60 miles per hour. 49 C.F.R. § 213.9(a). Defendant contends that Plaintiff's excessive speed claim is preempted by this federal speed regulation. An examination of *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732 (1993), reveals that Plaintiff's state law excessive speed claim is indeed pre-empted. *Easterwood* held that where a train is not exceeding the federal speed limit, a state law claim which would impose a more stringent standard was pre-empted. *Id.* at 1742-43. *See also Wright ex rel. Wright v. Illinois Cent. R.R.*, 868 F. Supp. 183, 186-87 (S.D. Miss. 1994); *Stanton v. National R.R. Passenger Corp.*, 849 F. Supp. 1524, 1527-28 (M.D. Ala. 1994). Therefore, the Defendant is entitled to summary judgment on Plaintiff's excessive speed claim.

The Defendant is not, however, entitled to summary judgment on Plaintiff's claims of failure to sound the horn and apply the brakes in a timely fashion. Contrary to Defendant's assertions, an examination of the evidence reveals that there is a disputed issue of material fact regarding these claims. The court notes that, although the excessive speed claim is itself preempted, evidence of the

rate of speed may be relevant on the timeliness of the horn warning and the application of the brakes.

VEGETATION

The Defendant also contends that Plaintiff's claims that vegetation obstructed the decedent's view of the track are also preempted by federal railroad safety regulations. The court disagrees. The federal regulation regarding vegetation at railroad crossings provides, in relevant part, that "[v]egetation on railroad property which is on or immediately adjacent to roadbed must be controlled so that it does not . . . obstruct visibility of railroad signs and signals" or "prevent proper functioning of signal and communication lines." 49 C.F.R. § 213.37. Plaintiff does not allege that vegetation at the crossing obscured railroad signs or signals, or prevented the functioning of signals. Plaintiff also does not allege that the obstructing vegetation was "on or immediately adjacent to" the roadbed. Plaintiff merely alleges that the vegetation in the area obstructed the decedent's view of the track. Only claims as to vegetation *on or immediately adjacent to the roadbed* are pre-empted. States are free to regulate vegetation beyond that area. *See Bowman v. Norfolk S. Ry.*, 832 F. Supp. 1014, 1020-21 (D.S.C. 1993). Therefore, this claim is not preempted, and there is a disputed issue of fact regarding whether the vegetation was sufficient to create an obstruction, and whether the Defendant should have worked with the adjoining landowners to correct any problems. The Defendant is not entitled to summary judgment on this issue.

"DITCH LIGHT" CLAIM

It is not clear to the court that Plaintiff has actually alleged that the Defendant was negligent in failing to equip the locomotive with a "ditch light." However, to

the extent that such a claim may be intended to fall within one of the broader allegations, the court will address the issue.

In *Springston v. Consolidated Rail Corp.*, 863 F. Supp. 535, 538-42 (N.D. Ohio 1994), the court held that a claim that a locomotive should have been equipped with ditch lights was preempted by the Boiler Inspection Act ("BIA"), 45 U.S.C. § 23 (now codified at 49 U.S.C. § 20701). The *Springston* court relied on *Napier v. Atlantic C.L.R. Co.*, 272 U.S. 605 (1926), which held that Congress intended the BIA to occupy the field of locomotive equipment regulation. This court agrees with the reasoning of the court in *Springston* that the equipment required on a locomotive is preempted by federal regulation. Therefore, the Defendant is entitled to summary judgment on this issue.

INADEQUATE WARNING DEVICES

The most complex preemption issue concerns Plaintiff's claim that the Defendant was negligent under Tennessee law for failing to provide adequate warning devices at the Oakwood Road crossing. Under the Highway Safety Act of 1973 ("HSA"), federal funds are made available to the states to improve grade crossings. The states are to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d). Additional regulations were promulgated by the Secretary of Transportation through the Federal Highway Administration ("FHWA"), under the authority of HSA and FRSA. The Defendant contends that Plaintiff's inadequate warning devices claim is preempted by 23 C.F.R. § 646.214(b)(3) and (b)(4). These regulations provide:

(3)(i) *Adequate warning devices*, under § 636.214 (b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, continuing accident occurrences, or any combination of these conditions.
(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.414 (b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

In *Easterwood*, 113 S. Ct. at 1740-41, the Court held that these regulations cover the same subject matter as state law inadequate warning device claims. When the regulations are applicable, such claims are preempted. Therefore, the issue is whether the regulations are applicable in this case, so as to preempt Plaintiff's claim.

The Defendant contends that when a crossing is upgraded using federal funds, preemption is automatically triggered, without consideration of whether any of the factors set forth in subsection (b)(3) are present. In support of this position, the Defendant relies upon the following statement in *Easterwood*:

> In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which the railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

113 S. Ct. at 1741. In *Easterwood*, however, there were no federal funds expended on the crossing upgrade. Therefore, the Court did not have occasion to decide whether the expenditure of federal funds *alone* would trigger preemption, even if one of the conditions specified under section (b)(3) is present. The court notes, however, that the Supreme Court formulated the issue as whether the "*preconditions* for the application of either regulation have been met." *Id.* (emphasis added). The use of the plural suggests that the Court contemplated that federal funding was merely the first condition required to trigger preemption.

The Defendant cites two published post-*Easterwood* cases in support of its position, *Elrod v. Burlington N.R.R.*, 68 F.3d 241, 243-44 (8th Cir. 1995), and *Hester v. CSX Transp., Inc.*, 61 F.3d 382, 384-87 (5th Cir. 1995). Also cited is an unreported district court case, *McDaniel v. Southern Pac. R.R.*, No. 3:94-CV-1917-X (N.D. Tex. Dec. 1, 1995), and an unreported state law case from an Iowa trial court, *Lubben v. Chicago Cent. & Pac. R.R.*, No. LA 25096 (Iowa D. Ct. Dec. 18, 1995). Each of these cases, however, involved grade crossings where no (b)(3) conditions were found to exist. As stated, *Easterwood* did not address preemption where such conditions exist; it found merely that no federal funding was present. 113 S. Ct. at 1741.

In *Hester*, a (b)(4) case, the court stated that federal funding of the installation of warning devices "presupposes that the Secretary approved and authorized the expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate to their task." 61 F.3d at 387. The court finds this reasoning unpersuasive. The record in this case shows that the reflectorized crossbucks and advance warning signs at the Oakwood Road crossing, although federally funded, were only a small part of a minimum protection program designed to place such minimum protection at all Tennessee crossings. Although authorization for the expenditure was given by the FHWA, there is no evidence in the record that there were specific determinations that such passive warning devices were adequate for particular crossings. At stated in *Shots v. CSX Transp., Inc.*, 38 F.3d 304, 308 (7th Cir. 1994), authorization of such minimum protection plans does not "imply that the thousands of crossings covered by it would be adequately safe if equipped with reflectorized cross-bucks. . . . Minimum is not a synonym for optimum, or even adequate." Furthermore, although the Defendant points to evidence that the "project" was inspected, there is a factual dispute regarding whether the Oakwood Road crossing in particular was inspected. There is also a dispute regarding whether the inspection, if made, was to verify the adequacy of the warning devices, or merely to inspect the workmanship of the devices.

The record in this case shows that at least some of the (b)(3) conditions appear to exist at the Oakwood Road crossing. These conditions include high speed train operations combined with limited sight distance, moderately high railroad and highway traffic, trucks carrying hazardous materials, and a prior collision at the crossing. § 646.214(b)(3)(i)(C)-(E). Yet, there is no evidence in the record that the Oakwood Road crossing was the subject of a study by a diagnostic team. The court agrees with the analysis in *Eldridge v. Missouri Pac. R.R.*, 832 F. Supp. 328 (E.D. Okla. 1993), in which it was stated that subsection (b)(3)(i)(F)

> mandate[s] the use of a diagnostic team before the railroad may use its own discretion, or delegate its authority, to determine the type of warning devices necessary for individual crossings under section (4). Section 3(i)(F) states that automatic gates with flashing light signals are required when a diagnostic team recommends them. *Section 3(ii) distinctly delineates the requirement that before the FHWA can find that automatic gates with flashing light signals are not required, a diagnostic team must justify that such devices are not appropriate.* Section (4) only comes into play "for crossings where the requirements of § 646.214(b)(3) are not applicable." As is apparent from a plain reading of section 3(ii), a determination under section (4) that the require-

ments of section (3)(i) are not applicable must first be made by a diagnostic team.

Id. at 333-34 (emphasis added). As no diagnostic recommendation was made, there was no basis for FHWA approval or disapproval.

Because of the presence of conditions specified in § 646.214(b)(3), and the absence of a recommendation by a diagnostic team pursuant to subsection (b)(3)(ii), the court finds that the preconditions for triggering preemption of Plaintiff's inadequate warning devices claim have not been met. Therefore, the Defendant is not entitled to summary judgment on the grounds of preemption.

Plaintiff's motion for summary judgment argues that the existence of (b)(3) conditions, and the absence of active warning devices at the Oakwood Road crossing amounts to negligence per se on the part of the Defendant. Therefore, Plaintiff argues, she is entitled to judgment as a matter of law on this claim. The federal regulation, however, is merely a standard that may be some evidence of negligence under Tennessee law. Plaintiff must still prove that any negligence on the part of the Defendant was the proximate cause of the accident. Contrary to Plaintiff's assertion, there are disputed issues of fact remaining to be resolved on this claim, and summary judgment is not appropriate.

CONCLUSION

In accordance with the foregoing discussion, Defendant Norfolk Southern Railway Company's motion for summary judgment is GRANTED as to Plaintiff's excessive speed and "ditch light" claims. Defendant's motion for summary judgment is DENIED as to Plaintiff's inadequate horn and braking, vegetation, and inadequate warning devices claims. Plaintiff's motion for summary judgment is DENIED.

IT IS SO ORDERED.

/s/ James D. Todd
JAMES D. TODD
United States District Judge
Date April 17, 1996

APPENDIX C

[Filed May 24, 1999]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

96-6371

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Plaintiff-Appellee,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellant,

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, *et al.*,
Defendants.

BEFORE: BATCHELDER, MOORE, and CLAY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX D

FEDERAL STATUTES

23 U.S.C. § 109. Standards

* * * *

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

23 U.S.C. § 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-

highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States

under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.—At least ½ of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment.—Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway crossings program.

(h) Use of funds for matching.—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

(i) Incentive payments for at-grade crossing closures.—

(1) In general.—Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade rail-

way-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads.—A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment.—The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of—

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments.—A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety.—In carrying out projects under this section, a State shall take into account bicycle safety.

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 903; Pub.L. 100-17, Title I, § 121(a), Apr. 2, 1987, 101 Stat. 159.)

(As amended Pub.L. 104-59, Title III, § 325(a), Nov. 28, 1995, 109 Stat. 591; Pub.L. 104-205, Title III, § 353(b), Sept. 30, 1996, 110 Stat. 2980; Pub.L. 105-178, Title I, §§ 1111(d), 1202(d), 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 146, 170, 193.)

49 U.S.C. § 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 866.)

APPENDIX E

FEDERAL REGULATIONS

23 CFR § 646.214 Design.

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) *Adequate warning devices,* under § 646.214 (b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214 (b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) *Grade crossing elimination.* All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[40 FR 16059, Apr. 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]